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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent,

—and—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 3, 1965

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IN THE

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No.

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Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a final order and judgment of the United States District Court for the Southern District of New York denying a motion of petitioner to punish respondent ("ASCAP") for civil contempt for violating an antitrust decree, or alternatively, to require the United States, as plaintiff, so to move.

Opinions Below

The District Court for the Southern District of New York did not render an opinion. Its judgment dated and filed on March 25, 1964, was endorsed on the back of petitioner's motion papers:

> "Motion denied. See record and transcript of proceedings; so ordered."

The opinion of the Court of Appeals for the Second Circuit, printed in Appendix A hereto, is reported in 341 F.2d 1003 (1965).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and is supported by *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U. S. 39 (1963).

Uncertain whether the controversy is inside or outside "the mainstream of the litigation in which the Government is directly concerned" (*Shenandoah, supra*), petitioner also filed a Notice of Appeal to this Court from the order and judgment of the District Court and a Jurisdictional Statement is being filed with this Court concurrently with this Petition for Certiorari. Expediting Act, § 2, 15 U. S. C. § 29; *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924).

Petitioner is thus proceeding concurrently by appeal and petition for certiorari, rather than risk dismissal because of an erroneous choice of appellate route.

Questions Presented

I. May a beneficiary of a government antitrust decree, who is injured by the defendant's noncompliance with that decree, enforce obedience to the decree if the government refuses to do so?

II. May a government antitrust decree authorize the defendant's continuing violation of the antitrust laws?

Statutes Involved

The statutory provisions involved are Rule 71 of the Federal Rules of Civil Procedure and §1 of the Sherman Act, 15 U. S. C. §1. They are printed in Appendix B hereto.

Statement

Petitioner owns and operates radio stations which use copyrighted music in their programming.

ASCAP is a performing rights society to which various copyright proprietors have granted the right to license the public performance for profit of copyrighted music owned by them. The opinion below described ASCAP as a "vast business enterprise controlling the licensing and distribution of a very large majority of the nation's copyrighted musical wares."

The government's complaint in this action against ASCAP, filed on February 26, 1941, alleged that in

violation of the Sherman Act and as part of a conspiracy, ASCAP "refuse(d) to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations"[1] and that it refused to renew licenses to radio broadcasters "unless the radio broadcasters accepted the licenses tendered to them by Society."[2] A consent decree against ASCAP was entered in this action on March 4, 1941, and was amended on March 14, 1950 (the "Amended Judgment").[3]

Section VI of the Amended Judgment orders ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory." Section IX(A) further orders ASCAP "upon receipt of a written application for a license for the right of public performance" of ASCAP's repertory to "advise the applicant in writing of the fee which it deems reasonable *for the license requested.*"[4]

On December 23, 1963, petitioner, a user of ASCAP music, made written application to ASCAP on behalf of its radio stations for a "blanket" license (i.e., for the right of public performance of all of the compositions in the ASCAP repertory) and requested ASCAP to advise petitioner in writing of the fee which it deemed reasonable for the blanket license requested.

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[1] Civil Action 13-95, Complaint Par. 15E.

[2] *Id.*, Par. 15F.

[3] R. Vol. I, pp. 2a-19a, inclusive. Page references with the prefix "R" are to the Appendix filed with the Court of Appeals and transmitted to this Court in compliance with Rule 21(3) of its Rules.

[4] Emphasis supplied.

ASCAP refused to quote a fee for the license requested and has insisted that the Amended Judgment permits it and its 9,000 members acting in concert to refuse to deal with petitioner on any form of license other than one dictated by ASCAP. (R. Vol. I, pp. 30a-33a, 86a-87a)

The form and terms of the blanket license requested (R. Vol. I, p. 66a) differed somewhat from ASCAP's latest form of blanket license (R. Vol. I, p. 36a) which had previously been issued to petitioner. Petitioner requested a different form of blanket license because ASCAP's latest form had proven to be discriminatory, arbitrary, inflationary and burdensome, as to petitioner. Section IV(C) of the Amended Judgment bars discrimination by ASCAP in "license fees or other terms and conditions between licensees similarly situated." Section VIII orders "ASCAP, in fixing its fees . . . to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses."

On March 5, 1964, more than 60 days[5] after its application to ASCAP for a reasonable fee, petitioner

[5] The opinion below incorrectly indicates, in footnote 3, that petitioner did not make a good faith attempt to negotiate and did not wait 60 days from the date of its application to ASCAP before approaching the government or moving to enforce the decree. The application to ASCAP for a license was made on December 23, 1963 (R. Vol. I, p. 30a). Petitioner, in December, January and February, specifically requested that ASCAP quote a fee (R. Vol. I, p. 25a); petitioner offered to negotiate with ASCAP and announced its readiness to consider concessions to ASCAP (R. p. 31a). It is uncontroverted that it was ASCAP which expressly refused to negotiate with petitioner (R. Vol. I, pp. 25a, 30a-32a). Notwithstanding ASCAP's refusal, petitioner waited more than 60 days before approaching the government on March 5, or moving on March 13, to enforce the decree (R. Vol. I, pp. 84a, 20-22a).

requested that the Department of Justice, on behalf of the Government, initiate civil contempt proceedings against ASCAP for "adamantly refusing to deviate from the form of license latterly issued by it" and "limiting broadcasters to the forms of licenses ASCAP deems most conducive in furthering its own economic interests." (R. Vol. I, pp. 84a-88a). On March 10, 1964, the government replied that it did not propose to make any decision on the request until the United States Court of Appeals for the Second Circuit had rendered its opinion in *Shenandoah* (R. Vol. I, p. 89a).

On March 13, 1964 petitioner moved in the District Court for the Southern District of New York to punish ASCAP for contempt for its neglect and refusal to comply with and obey the Amended Judgment, or in the alternative, to direct the United States, as plaintiff in the action, to so move that court (R. Vol I, p. 20a). Petitioner's affidavits alleged, with supporting statements of fact, ASCAP's violation of the Amended Judgment. (R. Vol. I, pp. 24a-90a).

ASCAP did not submit any affidavits in opposition to those submitted on behalf of petitioner.

The District Court denied petitioner's motion without opinion.

Because of the uncertainty of the applicable appellate procedure, petitioner filed two notices of appeal from the District Court judgment: one to this Court pursuant to the Expediting Act; the other, to the Court of Appeals for the Second Circuit. The District Court approved an application of the parties

to extend petitioner's time to perfect its direct appeal to this Court until after the Court of Appeals ruled on the appeal to it.

The Court of Appeals affirmed the judgment of the District Court. The court ruled that the appeal was properly before it, that petitioner, even if "affected" and "benefited" by the Amended Judgment, had no standing to seek compliance with the Amended Judgment, and that even if standing existed, the undisputed facts did not establish a violation of the terms of the Amended Judgment.[6]

The government has disclaimed a position on the merits but argued below that petitioner had no standing.

Reasons for Granting the Writ

I

The denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions is the principal question raised by this case. That this question was answered errone-

[6] The Court of Appeals misunderstood the Amended Judgment. This is evidenced by the statement in its opinion, footnote 2, that "The total net effect of the changes does not appear in the record." The effect of petitioner's proposed license could not possibly appear in the record and could not be computed because ASCAP violated the Amended Judgment at the threshold by refusing to quote a fee for the license requested. This is what necessitated petitioner's motion.

The same misconception underlies the view of the court below that petitioner "failed to follow the route marked out by the decree" because petitioner has not yet instituted a rate proceeding. The Amended Judgment does not contemplate a proceeding to determine the reasonableness of a rate until ASCAP has quoted a fee.

ously below is clear from this Court's recent opinion in *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 33 U. S. L. Week 4481, 4484 (May 24, 1965). Referring to the "clearly-expressed desire [of Congress] that private parties be permitted the benefits of prior government actions," this Court said:

> "Otherwise the benefits flowing from a major segment of the Government's enforcement effort would, in many cases, be denied to private parties."

This case also raises the question of the proper interpretation of Rule 71 of the Federal Rules of Civil Procedure, which has never been the subject of an opinion by this Court. This Court has in the past recognized the importance of settling questions of construction of the Federal Rules. E.g., *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

Rule 71 confers standing upon non-parties to enforce orders made in their favor. The Court of Appeals appears to have assumed that petitioner was "economically benefited by the decree" and "affected by the judgment" but nevertheless held that the Amended Judgment was not made "in favor of" petitioner.

However, in considering the appellate route, the Court of Appeals described this proceeding as a "private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment." This is the very reason that petitioner *has*

standing. If the government is not concerned, private rights will be denied for want of a vindicator unless one "affected" and "benefited" by the Amended Judgment is allowed to enforce the rights created for him.

The Court of Appeals relied on two completely inapposite decisions to deny standing. *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002 (S.D. N.Y. 1948) was concerned with a decree where the retention of jurisdiction was expressly limited to applications by the original parties "and no others." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940) held that the legislative history of the National Labor Relations Act clearly showed an intent to grant "exclusive power" to the National Labor Relations Board to redress unfair labor practices and to limit enforcement procedures to those undertaken by the Board. The Court of Appeals likened the status of an ASCAP licensee to that of a beneficiary of a National Labor Relations Board order.

If the Court of Appeals had elected to analogize the status of petitioner to that of a shareholder under the Securities Exchange Act of 1934, it would have been compelled to the conclusion that petitioner had standing. In *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), this Court found that the legislative history of the Securities Exchange Act indicated Congressional intent to confer enforcement power upon private parties.

The issue here is neither employees nor shareholders. This case is concerned with the antitrust laws and the "clearly expressed desire [of Congress]

that private parties be permitted the benefits of prior government actions." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra.*

II

The Court of Appeals construed the Amended Judgment so as to authorize a continuing violation of the antitrust laws. ASCAP is a copyright pool, a combination of sellers of music, who, but for ASCAP, would be competing with each other for the privilege of licensing the performance of music by radio stations. A concerted refusal to deal by these competing sellers except on terms dictated by them is the very type of antitrust violation that necessitated the complaint and consent decrees in this action. Forcing a standard contract on all users of music is in itself a concerted refusal to deal interdicted by the antitrust laws. See, *United States* v. *Griffith,* 334 U.S. 100, 106 (1948) where this Court found that "a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act."

Such a construction of the Amended Judgment—countenancing continued antitrust violations through insistence on defendant's method of contracting—is the very practice proscribed by this Court in its recent decision in *Columbia Artists Management, Inc.* v. *United States,* 33 U.S.L. Week 3374 (May 24, 1965), affirming 1963 CCH Trade Cases, Par. 70,955 (S.D. N.Y.), on rehearing 1964 CCH Trade Cases, Par. 71,081 (S.D.N.Y.).

There, Columbia Artists, a defendant subject to an antitrust decree, asked the District Court "to construe the decree so as to condone Columbia's continued refusal to deal with" a user of its services "and to approve Columbia's form of contract." The District Court held that insofar as the decree operated to allow Columbia to engage in an anti-competitive practice,

> "the decree is illegal and void as contrary to the letter and policy of the Sherman Act." 1963 CCH Trade Cases, at p. 78,800.

On reargument, the District Court adhered to its opinion that the form of contract for which Columbia sought condonation by reason of the decree was itself

> "a *per se* violation of the Sherman Act which this court cannot and will not sanction even to the extent of finding it in conformity with the consent decree." 1964 CCH Trade Cases, at p. 79,267.

This Court summarily affirmed the judgment of the District Court.

The Court of Appeals construed the Amended Judgment so as to authorize ASCAP to continue doing the very acts alleged in the complaint to be violations of the Sherman Act; i.e., insisting on its own form of license to radio stations (*supra,* footnotes 1 and 2).

Similar problems inhere in the numerous antitrust decrees involving compulsory licensing of patents.[7] It is important for this Court to decide that a person

[7] See Appendix C. Most of the compulsory licensing decrees in patent cases contain the standard provision requiring defendant to advise the applicant of the "royalty it deems reasonable for the patent or patents to which the application pertains."

entitled to a license from a monopolist under the compulsory licensing provisions of an antitrust decree can obtain a form of license suited to his needs and reject a license that discriminates against him. A cartel should not be privileged by an antitrust decree to engage in illegal practices.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 115—September Term, 1964.

(Argued November 30, 1964 Decided March 8, 1965.)

Docket No. 28909

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee.

METROMEDIA, INC.,

Petitioner-Appellant.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and BLUMENFELD, *District Judge.**

Appeal from denial of motion by radio broadcaster to punish ASCAP, defendant in government civil antitrust case, for contempt under consent decrees in

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* Sitting by designation.

the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge.* Affirmed.

SMITH, *Circuit Judge:*

Metromedia, Inc., owner and operator of a chain of radio and television stations, moved in the United States District Court for the Southern District of New York to punish the American Society of Composers, Authors and Publishers (ASCAP) for an alleged violation of the consent decree entered in *United States* v. *American Society of Composers, Authors and Publishers,* S. D. N. Y. Civ. No. 13-95, a government antitrust suit to which Metromedia was not a party. The District Court, Sylvester J. Ryan, *Chief Judge,* held that Metromedia did not have "the status or standing to move for punishment for contempt" and denied the motion. Metromedia now appeals. We hold that the appeal is properly before us; that Metromedia has no standing to bring the contempt action, and that even if standing existed, Metromedia's claims do not establish any violation of the terms of the decree, and we affirm the order denying the motion.

ASCAP is an association of composers, authors and publishers of musical compositions organized in 1914 for the purpose of assisting its members in policing and protecting their works against copyright infringements. In exchange for non-exclusive rights to its members' works, ASCAP licenses them for public performance, collects and distributes the royalties, and maintains a continuous surveillance over the myriad of music users for possible infringements. ASCAP has risen to a position of vital importance

with respect to the thousands of such copyright proprietors who would otherwise be unable to check performances of their compositions; to those in the music industry it has come to represent a vast business enterprise controlling the licensing and distribution of a very large majority of the nation's copyrighted musical wares. See *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322, 332 (S.D.N.Y. 1959).

In 1941 the government recognized the need for federal regulation of ASCAP's widespread activities and instituted antitrust proceedings. ASCAP entered into a consent decree whereby ASCAP, among other things, was required to offer licenses under which the mode of payment was related to the amount of music used. The 1941 decree eventually proved to be not wholly effective and in 1950 was supplanted by an amended judgment; the latter enjoined ASCAP from entering into licensing agreements which discriminate between users similarly situated and provided that the type of license granted either accord the user the right to perform all ASCAP compositions or one or more specified works and that a special procedure be followed for the determination of licensing fees, allowing for judicial intervention at the end of sixty days if ASCAP and the prospective licensee are unable to agree upon a reasonable charge.[1] Additional modifications of the decree were made in 1960.

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[1] The procedure for computing fees, as set out in the 1950 amended decree, is as follows:

"IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the appli-

Opinion of Court of Appeals

The present controversy arises out of Metromedia's application for a blanket license covering its ten radio stations, submitted to ASCAP in December 1963, and drafted in purported compliance with the terms of the 1950 supplemental judgment. Metromedia requested a license which would incorporate a markedly different method for computing royalties than was provided in previous ASCAP blanket licenses with local radio stations. Under the prior blanket agreements, the local station paid a sustaining fee based chiefly on a card rate and, as a commercial fee, 2.125% of its "net receipts from sponsors after deduction" of a sales commission, whereas, under Metromedia's scheme, royalties would be based on a percentage of gross

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cant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

"(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. * * *

"(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement."

receipts, and in the event that gross receipts in any license year exceeded gross receipts for the base year (1962), the percentage royalties payable on the excess would be less.[2] ASCAP refused to quote any fee on the requested basis and took the position that there was nothing in the amended judgment which required it to issue licenses in such a form. Thereafter, in March 1964, Metromedia, without making any further attempt to negotiate with ASCAP or to institute a rate proceeding under Section IX of the amended final judgment,[3] approached the government and demanded that it institute contempt proceedings against ASCAP based on ASCAP's refusal to quote, which

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[2] The fee arrangement which Metromedia contemplated in its license application was quite different from the usual ASCAP blanket license with local radio stations. "Net receipts" is defined in the standard ASCAP agreement to mean the gross amount paid for the use of the licensee's radio broadcasting facilities (for local radio programs), less any advertising commisssion not to exceed 15% actually allowed to a recognized advertising agency. "Gross amount" includes all amounts received for local radio programs after deducting rate card discounts, agency commissions, net revenue cleared at the source, net revenue for political broadcasts, and bad debts. Under the scheme proposed by Metromedia, "gross receipts" would be computed by taking the total revenues received from the sale of broadcasting facilities for local programs together with incidental broadcast revenues and commissions less rate card discounts and bad debts. Since the percentage royalty would depend on the gross receipts for the particular year, the amount collected by ASCAP could vary substantially from the amount collectible under the standard ASCAP formula. It is not clear whether news gathering costs would be a deduction from incidental broadcast revenues or would be nondeductible under sale of station time. Metromedia's formula would exclude trade sales (barter advertising) from gross, contrary to ASCAP's present formula. The total net effect of the changes does not appear in the record.

[3] Metromedia's proper recourse at that time was to continue negotiations with ASCAP for the next few weeks until sixty days had elapsed from the date of its application—or, at least, to make a good faith attempt to negotiate during that period. Failing that, Metromedia then would be able to invoke the court's jurisdiction for the purpose of determining a reasonable fee.

Metromedia claimed was in contravention of the provisions of the amended decree. The government replied that it did not propose to make any decision on the request until this court had rendered its opinion in *United States* v. *ASCAP, Application of Shenandoah Valley Broadcasting, Inc.* Metromedia then moved in the District Court to hold ASCAP in contempt of court "for its neglect and refusal to comply with and obey the Amended Final Judgment . . . , or in the alternative to direct the [government] herein to so move this court." The motion, opposed by both ASCAP and the government, was denied.

The denial of Metromedia's contempt motion is properly reviewable by this court; Section 2 of the Expediting Act, 15 U. S. C. §29,[4] under the circumstances presented here, does not require that appeal be made directly to the Supreme Court from the District Court order. The appellate procedure to be followed in this case appears to us to be governed by the Court's decision in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 375 U. S. 39, amended 375 U. S. 994 (1963), on remand 331 F. 2d 117 (2 Cir.), cert. den. 377 U. S. 997 (1964), rather than *Terminal R.R. Assoc.* v. *United States,* 266 U. S. 17 (1924).[5] While circum-

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[4] Section 2 of the Expediting Act reads:

"In every civil action brought in any district court of the United States under any of said Acts [antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

[5] The Court held in *Terminal R.R.* that an appeal from an order of the District Court holding defendants in contempt of a prior antitrust decree was governed by Section 2 of the Expediting Act. See also, *United States* v. *California Co-op. Canneries,* 279 U. S. 553 (1929); *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945); *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212 (1945).

stances are similar in *Terminal R.R.* in that the petitioner there was attempting to enforce the provisions of an antitrust decree by instituting a contempt action (in which the government did not originally join) against one of the defendants, one crucial difference is that the petitioner, a co-defendant, was a party to the decree. Its status to initiate the contempt proceedings was not challenged as is Metromedia's here. Involved in the *Shenandoah* case was the same ASCAP consent decree which is the subject of our present inquiry. Shenandoah Valley Broadcasting, however, unlike Metromedia, was not seeking to hold ASCAP in contempt but instead was attempting judicially to force ASCAP into issuing the type of license that Shenandoah requested. The District Court found that the consent decree did not require ASCAP to issue a special license of that kind, and Shenandoah appealed directly to the Supreme Court under Section 2 of the Expediting Act. In explaining the dismissal of the appeal for want of jurisdiction, the Court held that the Expediting Act did not permit direct appeals from ancillary orders of this type and that such appeals are authorized only from final judgments where the United States is a complainant. "The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." 375 U. S. at 40. Similarly, Metromedia's motion for contempt evolves from a private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment. Cf. *Olympic Refining Co.* v. *Carter*, 332 F. 2d 260, 263 (9 Cir. 1964).

Finding as we do that this appeal is properly before us, we hold that Metromedia lacks standing to move in this government antitrust action to punish the defendant ASCAP for contempt. Metromedia is not a party to the action and, indeed, could not have intervened as of right. See *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).[6]

Metromedia relies on Rule 71 of the Federal Rules of Civil Procedure.[7] Rule 71, however, expressly requires that the order sought to be enforced by the non-party be made in favor of that person. Here, no order was made in Metromedia's favor. No monetary or other relief was specifically granted to Metromedia —it was not even named in the judgment—and it is not enough to say that Metromedia was indirectly or economically benefited by the decree. See *United States* v. *Paramount Pictures, Inc.,* 75 F. Supp. 1002 (S. D. N. Y. 1948). The judgment is in favor of the United States alone.

The status of persons such as ASCAP licensees is not unlike that of the beneficiaries of a National

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[6] ASCAP licensees and users have tried in several ways to alter or enforce the terms of the amended consent decree. In *Sam Fox Publishing Co.,* the petitioner sought to intervene directly in order to acquaint the court with its proposals for the modification of certain provisions in the decree (the government had previously rejected these modifications in the form proposed). Shenandoah Valley Broadcasting instituted rate proceedings under Section IX (A) of the 1950 amended judgment in the hope of convincing the court that ASCAP was compelled under the decree to enter into licensing arrangements which differed from the standard ASCAP licenses and which were drafted to meet the licensee's individual requirements. And now Metromedia has attempted to utilize contempt proceedings.

[7] Rule 71 reads in pertinent part:

"When an order is made in favor of a person who is not a party to the action he may enforce obedience to the order by the same process as if he were a party; * * *"

Labor Relations Board order. A labor organization, even the one which filed the charges upon which the Board's proceedings were initiated, has no standing to have an employer adjudged in contempt for failure to obey a decree enforcing the order of the Board. *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York,* 309 U. S. 261 (1940). The Board, the Court found, has been provided by Congress with exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. Likewise, the government is the sole proper party to seek enforcement of government antitrust decrees. The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. Thus, the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.

Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights. The government has not been blind to the needs of the individual members of the music industry; as already noted, the original judg-

ment against ASCAP has been modified from time to time to meet changing conditions. Furthermore, in a situation of this kind where an ASCAP licensee such as Metromedia is disputing ASCAP's computation of fees, resort can be had to Section IX(A) of the 1950 amended decree which authorizes the licensee to apply to the court for the determination of a reasonable fee where the parties are unable to reach agreement within a specified period of time. ASCAP would then have the burden of showing that its existing fee is reasonable and non-discriminatory.

Even if we were to find that Metromedia did have standing to maintain this contempt action against ASCAP, we would nevertheless reach the same result. It is true that a user has the right under the amended decree to a blanket license at a reasonable fee, and that, unlike the applicants in *Shenandoah,* Metromedia is not seeking a license whose scope or coverage differs from that contemplated by the decree but rather is asserting a claim to a reasonable fee. However, Metromedia has no right conclusively to determine certain elements of the "fee" and then to require ASCAP, under pain of contempt, to quote a matching percentage figure. On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate. Thus far, it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree.

The order denying the motion to punish ASCAP for contempt is affirmed.

APPENDIX B

STATUTES

Rule 71 of the Federal Rules of Civil Procedure provides:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party. 28 U. S. C. Rule 71."

Section 1 of Title 15 of the United States Code (§ 1 of the Sherman Act) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

APPENDIX C

Citations to Cases Involving Compulsory Licensing Decrees

United States v. *Borg-Warner Corp.*, 1962 CCH Trade Cases ¶70,461 (S.D. Tex. 1962);

United States v. *Driver-Harris Co.*, 1961 CCH Trade Cases ¶70,031 (D.N.J. 1961);

United States v. *Pitney-Bowes, Inc.*, 1959 CCH Trade Cases ¶69,235 (D. Conn. 1959);

United States v. *B. F. Goodrich Co.*, 1958 CCH Trade Cases ¶68,994 (S.D.N.Y. 1958);

United States v. *Radio Corporation of America*, 1958 CCH Trade Cases ¶69,164 (S.D.N.Y. 1958);

United States v. *United Fruit Co.*, 1958 CCH Trade Cases ¶68,941 (E.D. La. 1958);

United States v. *Robertshaw-Fulton Controls Co.*, 1957 CCH Trade Cases ¶68,592 (W.D. Pa. 1957);

United States v. *National Screen Service Corp.*, 1957 CCH Trade Cases ¶68,670 (S.D.N.Y. 1957);

United States v. *Crown Zellerbach Corp.*, 1956 CCH Trade Cases ¶68,544 (N.D. Ill. 1956);

United States v. *Michigan Tool Co.*, 1956 CCH Trade Cases ¶68,290 (E.D. Mich. 1956);

United States v. *Cogan Co.*, 1956 CCH Trade Cases ¶68,375 (W.D. Pa. 1956);

United States v. *American Linen Supply Co.*, 1956 CCH Trade Cases ¶68,542 (N.D. Ill. 1956);

United States v. *International Business Machines Corp.*, 1956 CCH Trade Cases ¶68,245 (S.D.N.Y. 1956);

United States v. *International Cigar Machinery Co.*, 1956 CCH Trade Cases ¶68,426 (S.D.N.Y. 1956);

Citations to Cases Involving Compulsory Licensing Decrees

United States v. *General Shoe Corp.*, 1956 CCH Trade Cases ¶68,271 (M.D. Tenn. 1956);
United States v. *Maycobar, Inc.*, 1955 CCH Trade Cases ¶68,023 (S.D. Cal. 1955);
United States v. *General Ry. Signal Co.*, 1955 CCH Trade Cases ¶67,992 (W.D. N.Y. 1955);
United States v. *Pittsburgh Crushed Steel Co.*, 1954 CCH Trade Cases ¶67,892 (N.D. Ohio 1954);
United States v. *Food Machinery & Chemical Corp.*, 1954 CCH Trade Cases ¶67,829 (N.D. Cal. 1954);
United States v. *Hunter Douglas Corp.*, 1954 CCH Trade Cases ¶67,802 (S.D. Cal. 1954);
United States v. *Eastman Kodak Co.*, 1954 CCH Trade Cases ¶67,920 (W.D. N.Y. 1954);
United States v. *Servel, Inc.*, 1954 CCH Trade Cases ¶67,665 (E.D. Pa. 1954);
United States v. *Bendix Aviation Corp.*, 1953 CCH Trade Cases ¶67,591 (S.D.N.Y. 1953);
United States v. *Bearing Distributors Co.*, 1953 CCH Trade Cases ¶67,595 (W.D. Mo. 1953);
United States v. *Telescope Carts, Inc.*, 1953 CCH Trade Cases ¶67,573 (W.D. Mo. 1953);
United States v. *Davis Co.*, 1952 CCH Trade Cases ¶67,403 (S.D.N.Y. 1952);
United States v. *Liquid Carbonic Corp.*, 1952 CCH Trade Cases ¶67,248 (E.D.N.Y. 1952);
United States v. *United States Gypsum Co.*, 1951 CCH Trade Cases ¶62,853 (D.D.C. 1951);
United States v. *Automatic Sprinkler Co. of America*, 1948 CCH Trade Cases ¶62,230 (N.D. Ill. 1948);
United States v. *White Cap Co.*, 1948 CCH Trade Cases ¶62,268 (N.D. Ill. 1948).